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**PRE-APPEAL BRIEF REQUEST FOR REVIEW**

Docket Number (Optional)

SPORT.201

I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)]

on \_\_\_\_\_

Signature \_\_\_\_\_

Typed or printed name \_\_\_\_\_

Application Number

10/692,402

Filed

10-23-03

First Named Inventor

James A. Vanek

Art Unit

1723

Examiner

Soohoo

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).

Note: No more than five (5) pages may be provided.

I am the

☐ applicant/inventor.☐ assignee of record of the entire interest.  
See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed.  
(Form PTO/SB/96)☒ attorney or agent of record. 31436  
Registration number \_\_\_\_\_☐ attorney or agent acting under 37 CFR 1.34.

Registration number if acting under 37 CFR 1.34 \_\_\_\_\_

  
Signature

Robert D. Varitz

Typed or printed name

503-720-1983

Telephone number

May 12, 2006

Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below\*.

☒ \*Total of -1- forms are submitted.

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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In the Office action dated March 14, 2006, the Examiner finally rejected all of the claims in the Application. Claims 1, 7 and 8 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U. S. Patent No. 3,223,389 to Simmonds. Claims 6, 11 and 13 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Simmonds in view of U. S. Patent No. 4,083,653 to Stiffler and U. S. Patent No. 6,419,385 to Walls, and alternately stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Simmonds in view of U. S. Patent No. 4,872,764 to McClean and Walls.

In response to the first Office action, the independent claims were amended to recite, in every case, that the mixer assembly includes a *flexible* polymer blade set. This is disclosed in the Specification, page 6, line 11 to page 7, lines 4, and Fig. 9. The polymer blades flex, upon rotation in a first direction, to extend or rotate outwardly to provide a mixing force to the material being mixed. When rotated in the opposite direction, the blades flex inwardly, thus collapsing to a state where they may be withdrawn from a narrow opening in a container.

Although the Examiner states that such construction is obvious in light of '389 because polymer mixing blades are known, Applicant contents that this rejection is not well taken. Initially, the Examiner did not provide any art whatsoever which disclosed a polymer mixing blade. This was rectified in the second, final Office action, however, the limitation of FLEXIBLE is still completely ignored by the Examiner. In response to Applicants statement that, if such devices are known, production of patent or non-patent literature should be fairly simple, the Examiner purported to provide Applicant with a lesson in material science, in what can best be described as an inappropriate response, lacking in the degree of candor and courtesy which is expected of practitioners dealing with the U. S. Patent and Trademark Office, which still did not

do anything to make up for the shortcomings of the Examiner's applied art. That the Examiner chose to cite a reference which is used in the proctology art is indicative of the Examiner's lack of ability to find, cite and apply relevant art.

The primary reference, Simmonds, says little about the material used in the device of the patent, however, it is clear that the blades are metallic and non-flexible. Thus, the limitations added to claims 1, 8 and 13 in response to the first Office action renders the claims allowable over the art applied in the first Office action. The additional art applied in the second Office action at least shows the use of a polymer in a mixing blade, which art should have been cited and applied in the first Office action had a thorough search been done by the Examiner. Given two opportunities to search, the Examiner has still failed to locate, cite and apply any art which shows a flexible polymer blade: the newly applied art uses rigid polymer blades. The art cited in the "materials science" portion of the Office action also uses rigid polymer blades. It is unlikely that anyone of ordinary skill in the art would consider using the device of Bindel, U. S. Patent No. 4,092,984, in combination with a paint mixing device.

The claims are allowable over the applied and cited art because there is a clear deficiency in support of the final rejection of all claims by the Examiner, in that the Examiner has failed to cite and apply art wherein the mixer assembly includes a flexible polymer blade set having plural, integrally formed blades, and wherein each blade has a twist intermediate an attachment end which is attached to a blade set hub and a free end. The claims should be allowed in their current form.